National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 4, 1998

TO: Sandra Dunbar, Regional Director, Region 3

FROM: Barry J. Kearney, Associate General Counsel , Division of Advice

SUBJECT: Delavan Industries, Inc., Case 3-CA-21282

177-1667-5000, 530-2050-2500, 530-4020-2033-2500, 530-4825-6700

This successorship case was submitted for advice as to whether the Employer unlawfully refused to recognize and bargain with the Union where the requisite numerical majority can be established only by including certain laid-off, resigned and/or discharged employees of the predecessor.

FACTS

The Employer and its predecessors have been engaged in the manufacture and servicing of car carrier trailers at its West Seneca, New York facility for more than forty years. The Union represented the production and maintenance employees since at least the 1950s. In the 1970s, the original Delavan Industries, Inc. was acquired by Ryder Corp., which continued to recognize and bargain with the Union. In a 1994 reorganization, Ryder transferred the car carrier production operation to its wholly owned subsidiary, Commercial Carriers, Inc. (CCI). CCI continued to honor the collective-bargaining agreement then in effect. Under the collective-bargaining agreement, most laid-off employees retained their unit seniority and recall rights for a period of time equal to their length of service up to a maximum of twelve months.[(1)]

CCI's production levels were based on pending orders from Ryder and other customers. Consequently, unit employees were routinely laid off and recalled in accordance with their contractual seniority as business fluctuated. In addition to such "routine" layoffs, a number of unit employees were laid off in 1995 when a strike by a separate unit of Ryder car carrier drivers caused CCI's car carrier production and repair work to decline. Among the employees to feel the effects of the drivers' strike were J. Perry and D. Middlebrook, who were laid off in April and July, respectively. By the time the drivers' strike ended in October 1995, Perry and Middlebrook were no longer eligible for recall due to their low unit seniority, and neither individual ever returned to work for the Company. Thereafter, CCI's normal order-based production, layoff and recall cycle continued, with successive layoffs occurring, inter alia, in October and November 1996.

In January 1997, unit employee Nanthalonsyn was terminated for violating CCI's attendance policy. Nanthalonsyn did not seek the Union's assistance or otherwise appeal CCI's discharge decision.

CCI's business actually increased in the first quarter of 1997 to such an extent that the contractual recall list was exhausted and a few new employees were hired. However, two individuals, Kozel and DeRose, had become frustrated with the frequent layoffs and terminated their employment with CCI to take jobs elsewhere. Thus, Kozel resigned in January 1997 and DeRose, who had been part of the November 1996 layoff, rejected a recall offer in March. A third employee, Inluxay, also resigned in March, but for reasons unrelated to CCI's irregular staffing practices. Inluxay, who had been working another full time job in addition to his employment with CCI, contracted pneumonia and found himself unable to handle both jobs. He therefore decided to resign from CCI and continue with his other job.[(2)]

Also in March 1997, CCI and the Union reached agreement on a successor contract. The new agreement was to be effective through February 29, 2000. There is no indication that CCI contemplated any changes in its future operations at the time of the negotiations.

In May and June 1997, a decline in orders led to the layoff of 21 employees. These employees were never recalled. At some time that summer, Ryder decided to get out of the car carrier business and, consequently, to close CCI.(3) CCI's operations ended on September 18, 1997 and the last 45 unit employees were laid off.

Following the closure, CCI's assets and stock were transferred to separate Ryder-owned holding companies. In February 1998, two Texas-based companies, unaffiliated with Ryder, entered into a joint venture to commence a car carrier trailer production business. To this end, the joint venture purchased CCI's assets, including all of the equipment previously used by the CCI unit employees. The joint venture also formed a new corporation to operate at CCI's West Seneca facility under the Delavan Industries, Inc. name (the Employer).(4)

On learning of the planned resumption of car carrier trailer production at the West Seneca facility, the Union, by letter dated February 27, 1998, demanded recognition and insisted, pursuant to the contractual successor clause, that the Employer abide by the collective-bargaining agreement with CCI. In a March 10 reply, the Employer asserted that it was not obliged to assume the CCI contract. It did not comment on the recognition demand.

During the same period, the Employer hired many of CCI's former managers and other non-unit employees. It also placed advertisements for bargaining unit positions in the area newspapers. The terms and conditions of employment offered were markedly different from those CCI provided under the collective-bargaining agreement. Thus, Delavan's wage rates are about $3 lower than the contractual rates, employee health insurance contributions are much higher,(5) vacation benefits are less generous,(6) and there is no substitute for the contractual pension plan.

Two hundred and forty individuals applied for bargaining unit positions, including 57 former CCI employees who had been laid off between May and September 1997, all of whom appear to have had recall rights under the CCI contract.(7) Although the Employer offered jobs to 51 of those 57 applicants, only 34 accepted employment.(8)

By May 26, the Employer had hired a total of 75 employees, including the 34 laid-off former CCI employees who had contractual recall rights, former CCI employees Perry, Middlebrook, Nanthalonsyn, Kozel, DeRose and Inluxay, who did not have extant contractual recall rights, and 35 employees who had no connection to CCI. By the same date, normal production had also begun, all shifts were operating and jobs in all five unit job classifications had been filled. Although the Employer hired an additional 14 employees between May 26 and July 20 and has asserted indefinite plans to increase the workforce to 100 at some later date, it has conceded that it was operational and had hired a "substantial and representative" complement of employees by May 26.(9) It nevertheless contends that July 20 is the appropriate date for determining whether the Union has achieved majority status.

The Union repeated its recognition demand by letter dated June 18. The Employer never responded to the letter.

ACTION

We conclude that the Employer did not hire a sufficient number of predecessor employees to comprise a numerical majority of its workforce and that the instant refusal to bargain charge should therefore be dismissed, absent withdrawal.

Whether an alleged Burns(10) successor has a duty to recognize and bargain with a union claiming to represent its employees turns on (1) whether there is "substantial continuity" between the old and new enterprises(11) and (2) whether a majority of its employees were employed by the predecessor entity.(12) In making the "substantial continuity" determination, the Board examines a number of factors including whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.(13) In cases where the successor employer does not simply take over an ongoing predecessor operation and workforce, the majority determination is made at the point the new business is in normal or substantially normal production and a "substantial and representative" employee complement is in place, i.e., the new employer has hired employees in substantially all of the job

classifications it intends to maintain.[14] This approach reflects the balancing of "the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible."[15] Once the "substantial and representative" employee complement date has been established, determining whether a majority of the successor's employees were union-represented employees of the predecessor is a matter of simple arithmetic: a bargaining obligation is owed if the number is greater than 50 percent, and there is no bargaining obligation if the number is 50 percent or less.[16]

We agree with the Region that the "substantial continuity" requirement for successorship is met here. Thus, there is little doubt that the Employer is engaged in the same business as CCI, using the same production processes to produce car carrier trailers.[17] There also is no dispute that the unit employees' working conditions are essentially unchanged in most respects: employees are doing the same jobs, in the same location, with the same equipment, under the same or similar working conditions and under many of the same supervisors and managers.[18] In view of all the other indicia of continuity, the passage of six months between CCI's September 1997 closure and the commencement of Delavan's operations in March 1998 does not require a different conclusion, since a hiatus in operations generally is important only when other changes have occurred.[19]

We also agree with the Region that May 26, 1998 is the appropriate date for determining whether the Employer must recognize and bargain with the Union. For, by that date, Delavan had commenced normal operations on all shifts and had hired employees in all five unit job categories. Accordingly, May 26, rather than July 20, the date urged by the Employer, would best strike the requisite balance between maximizing employee participation and resolving "as soon as possible" whether they will be represented.[20]

Turning to the question of the Union's majority, we note that the Board has on a few occasions included in the majority calculus successor employees whose employment relationship with the predecessor had arguably been severed before the predecessor's operations ceased.[21] Although the Board has never stated an explicit test, examination of the facts and circumstances that inform the these decisions --the "res gestae"-- shows that the "includible" employees had separated from active employment for reasons directly or proximately related to the cessation of the predecessors' operations.

Thus, in Derby Refining,[22] the Board included in the majority count seven employees of the predecessor, Pester, who had retired or were in layoff status prior to its closure. Three of these employees had retired on Pester's advice that their pension benefits would be larger if they retired before they were laid off. The other four employees, who had been laid off because of Pester's severe financial difficulties, were recalled to work on a strictly temporary basis during the layoff but declined. Ultimately, Pester ceased operating and its plant and assets were acquired by Derby. Derby reopened the Pester facility and, several months later, when the facility was fully operational, the union requested recognition. At that time, Derby employed 80 employees, including 40 who previously had been Pester employees, the three retirees and the four laid-off employees who had refused temporary recall. Derby refused to recognize the union on the ground that it had not hired a numerical majority of predecessor employees, arguing that those employees who had left Pester's employ before it acquired Pester's assets were "new" employees. Id. at 1016. The Board rejected this argument and, instead, concluded that the seven employees were properly included in determining the union's majority status. Ibid. Specifically, regarding the retirees, the Board concluded that their retired status did not affect their attitudes toward continued union representation or their attachment to the unit, especially since the retirements were not "self-initiated withdrawals from the work force," but rather were at Pester's urging to prevent a loss of pension benefits. Ibid. The Board found no reason to believe that the retirees would not have continued to work absent Pester's advice to maximize their pension benefits by retiring and noted that the retirees readily accepted positions at their old work place when those positions were subsequently offered. Ibid. The Board similarly concluded that the four individuals who rejected temporary recall were properly included in the majority count because the short-term recall they had been offered would not have restored them to their former permanent positions. As such, their actions could not be considered an abandonment of interest in the unit. Id. at 1016-1017.[23]

In Cincinnati Bronze, the successor also defended against a bargaining obligation on the ground that its workforce did not meet the Burns/Fall River majority requirement. 286 NLRB at 45. Thus, the employer argued that although 20 of its 39 unit employees had previously been employed by the predecessor, six individuals the successor had hired who had retired shortly after the predecessor closed and two who were in layoff status at the time of the closure should be excluded from the majority

count. The Board adopted the administrative law judge's contrary finding that all eight were properly counted toward the majority. 286 NLRB at 39 and 45-46. Regarding the retirees, the judge rejected the employer's claim that they did not have an expectation of continuity in the bargaining unit, stating that there was no evidence that by opting to receive a pension from the predecessor the retirees had any different work-related interest or concerns than other employees or would have changed their desire for continued union representation. Id. at 46. The judge also found that the two laid-off predecessor employees should be included in the majority count. Thus, the judge rejected as unpersuasive the employer's assertions that the laid-off employees had no expectation of continued employment and that the union had abandoned them by failing to obtain in its closing agreement with the predecessor the same supplemental benefits it obtained for employees who were working at the time of the closure. Id. at 45. The judge found that although the predecessor had closed before the employees were recalled, "there was no showing that they would not have been recalled had business picked up." Ibid. The judge also concluded that the fact that the union had obtained other significant benefits for the laid-off employees (including a one year extension of their recall rights) belied the employer's suggestion that it had lost interest in their welfare. Ibid.

Thus, as analyzed by the Board, the action (layoff, retirement or refusal of recall) giving rise to the asserted loss of attachment to the bargaining unit in Derby and Cincinnati Bronze was a consequence of the circumstances leading up to the closing of the predecessor's business and had nothing at all to do with the employees' own desires for continued representation or their attachment to their bargaining units.[(24)] In such circumstances the Board found it appropriate to include the contested predecessor employees in determining whether the successor had hired a majority from the predecessor's unit.

Turning to the facts of the present case, we conclude that it is inappropriate to include the six contested employees in determining whether the Union has majority status in the Employer unit. It is clear that Delavan's work force would have to have included at least 38 former CCI employees by May 26 in order to trigger a bargaining obligation. As noted above, however, only 34 (or 45.3 percent) of Delavan's 75 employees had either been working for CCI at the time of its closure or still retained recall rights under the contract between CCI and the Union. Therefore, the Employer would be obliged to recognize and bargain with the Union if any four of the six former CCI employees are included in the majority. We concluded, however, that it would be inappropriate to include any of the six. Thus, under the Board's approach in the foregoing cases, individuals whose employment relationship with the predecessor had been severed were included in the successorship majority calculus where the severance occurred for reasons related to the predecessor's closing. Here, the employment relationship between CCI and Perry, Middlebrook, Nanthalonsyn, Kozel, DeRose and Inluxay terminated for reasons entirely unrelated to CCI's closure. Thus, Perry and Middlebrook's contractual recall rights had expired long before Ryder decided to close CCI,[(25)] Kozel and DeRose quit their jobs expressly because they were dissatisfied with CCI's layoff-recall cycle, and when Inluxay decided he could no longer work two jobs because of his health, he chose to resign from CCI and continue with his other job. Finally, there is no dispute that CCI discharged Nanthalonsyn for cause, and, while he may not have fully understood his rights to challenge his termination, it is at best speculative that he would have prevailed on a grievance or other appeal and regained his job with CCI. In these circumstances, we conclude that these employees should not be included in the majority.

Accordingly, the Union did not achieve majority status in the Delavan unit and the refusal to bargain charge should be dismissed, absent withdrawal.

B.J.K.

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[1] Certain senior employees hired before June 1992 retained their seniority for 24 months after last performing any work for the Company.

[2] It is unknown whether he sought a medical leave of absence from CCI.

[3] About 85-90 percent of CCI's total production was under contract to Ryder.

[4] It appears that the new corporation wanted to exploit the good reputation the Delavan name enjoyed in the industry.

[5] Under the contract, CCI employees had contributed $3.35 per week for family coverage. The Employer initially required a $50 contribution for similar coverage, which was later reduced to $34 per week.

[6] Under the CCI contract, senior employees could earn up to five weeks of vacation each year. The Employer's maximum vacation benefit is two weeks for employees with more than one year of service.

[7] Thus, all but nine of the 66 unit employees employed by CCI during its last five months of operation applied for positions with the Employer. Since no new unit employees were hired after March 1997, even the most junior employees would still have been entitled to recall (by CCI) in March 1998.

[8] It appears that many of the 17 who declined the Employer's offers did so because they found the terms offered by Delavan to be unacceptable.

[9] Three of the individuals hired after May 26 had worked for CCI and been members of the Union in the months preceding the closure.

[10] NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972).

[11] See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 45 (1987).

[12] See generally Fall River Dyeing Corp. v. NLRB, 482 U.S. at 41-52.

[13] See Morton Development Corp., 299 NLRB 649, 650 (1990).

[14] Fall River Dyeing v. NLRB, 482 U.S. at 52; Burns, supra, 406 U.S. at 295. See also Premium Foods, 260 NLRB 708 (1982), enfd. 709 F.2d 623 (9th Cir. 1983); Indiana Mack Sales and Service, 272 NLRB 690, 694-695 (1984); Hudson River Aggregates, 246 NLRB 192 (1979), enfd. 639 F.2d 865 (2d Cir. 1981).

[15] Fall River Dyeing v. NLRB, 482 U.S. at 48 (citations omitted). See also Premium Foods, 260 NLRB at 718.

[16] See, e.g., Harbert International Services, 299 NLRB 472 (1990) (alleged successor employer under no obligation to recognize and bargain with the Union where only 75 of 151 of its employees had been employed by predecessor and represented by union).

[17] The fact that CCI's major customer, Ryder, is not a Delavan customer does not militate against a finding of continuity, for a successor need not serve the same customers as its predecessor and need only maintain the "same class of customers." Good N' Fresh Foods, 287 NLRB 1231, 1235 (1988). Cf. Cagle's, Inc., 218 NLRB 603 (1975) (different customers only one of numerous factors showing lack of continuity, including: one-year hiatus; more new than predecessor supervisory personnel and different equipment used to produce different and fewer products).

[18] The unfavorable differences between the wages and benefits offered by Delavan and those enjoyed under the CCI collective-bargaining agreement do not negate continuity. For, under the Board's successorship doctrine, a successor normally has the freedom to set initial terms and conditions of employment. See Burns, supra, 406 U.S. at 294-295.

[19] See Fall River Dyeing v. NLRB, 482 U.S. at 45 (seven month hiatus did not destroy continuity); Nephi Rubber Products Corp., 303 NLRB 151, 152-153 (1991) (in the absence of other indicia of discontinuity, 16-month hiatus did not preclude successorship finding).

[20] See n. 15, supra, and accompanying text. See also Fall River, 482 U.S. at 49 (stressing "significant interest of employees in being represented as soon as possible"). Inasmuch as the Employer's future expansion plans are uncertain, there is no reason to utilize the later date urged by the Employer for determining its bargaining obligation. Compare Delta Carbonate, Inc., 307 NLRB 118 (1992) (no evidence that successor, at date of recognition, planned to diversify its product and customer base with sufficient certainty to warrant delay of union recognition) with Myers Custom Products, 278 NLRB 636, 637 (1986) (60 day delay found appropriate where, before commencing operations, successor planned to select and train an employee complement substantially larger than the predecessor workforce within two to three months and, in fact, nearly doubled the prior complement within that time).

[21] See Derby Refining Co., 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990); Cincinnati Bronze, 286 NLRB 39 (1987). Cf. Smith and Johnson Construction Company, 324 NLRB No. 153, slip op. at 1 (Oct. 31, 1997) (affirming ALJ's finding that absent successor's unlawful refusal to hire, 18 discriminatees would have constituted a majority of the successor's 26-employee work force; Board, citing Derby and Cincinnati Bronze, found five discriminatees in layoff status with extant recall rights properly included in determining union's majority status).

[22] 292 NLRB at 1015.

[23] In including the seven employees in the majority count, the Board emphasized the relatively short length of time between the actions that separated the employees from employment with Pester and Pester's closing (from six months to a year in the case of the retirees and less than one year in the case of the rejected recall offers) and stated that significantly longer amounts of time might require a different result. See 292 NLRB at 1016-1017, nn. 7 and 9.

[24] Indeed, the retirees in both cases did so solely to preserve the benefits promised by the predecessor; there was no evidence that any of them would have taken retirement had it not been for the impending layoffs and/or closures. And there was nothing to indicate that the laid-off employees in either case would have rejected permanent recall to their jobs if the predecessors had not closed. See, e.g., Cincinnati Bronze, 286 NLRB at 45-46 (regarding the laid-off employees, "there is no showing that they would not have been recalled had business picked up"; as to the retirees, fact that they opted to secure their pension benefits when predecessor closed would not "have changed their attitudes or desire for continued union representation").

[25] Compare Cincinnati Bronze, 286 NLRB at 45 (laid-off employees' recall rights extended under union's closing agreement with predecessor). See also Smith & Johnson, supra, 325 NLRB No. 153, slip op. at 1.